

December 30, 2011

Mary Ann Stevens
Rules Development Branch
Office of Legal Counsel
Indiana Department of Environmental Management
100 North Senate Avenue
Mail Code 65-45
Indianapolis, Indiana 46204-2251

OFFICIAL COMMENT

**Subject: LSA Document #08-764 – Notice of Comment Period
Development of New Rules and Amendments to Rules Concerning
Antidegradation Standards and Implementation Procedures**

Dear Ms. Stevens:

On behalf of the members of the Indiana Chamber of Commerce, this letter provides comments on LSA #08-764, Development of New Rules and Amendments to Rules Concerning Antidegradation Standards and Implementation Procedures. The Indiana Chamber is the state's largest broad-based business advocacy organization, with nearly 5,000 members that employ more than 800,000 Hoosiers in all 92 counties. The Indiana Chamber has served the business community since 1922.

The Indiana Chamber appreciates all the time and energy invested by IDEM's staff and the many businesses and industries that have likewise spent significant time on this important rule. A major concern of the Indiana Chamber is that the current language allows the agency administering this rule significant discretion. While the current administration may use this discretionary power in a rational manner, another administration in future years may not be so reasonable. An inappropriate implementation of this rule could severely restrict future economic development in Indiana, without resulting in any significant benefit to water quality. In addition, this rule could compromise the competitiveness of existing industries by limiting their ability to expand operations or change technologies.

Overall, it seems that what is needed is clarity about 1) when does an antidegradation review need to be performed, 2) what level of detailed information is adequate and 3) how will IDEM decide to approve the demonstration or require additional controls that may be necessary to reduce or prevent an increase in loading.

To this point, preliminarily adopted rule has the following major issues that need to be addressed before final adoption.

1. Section 1(b) of the proposed rule is much broader than the Legislature intended when it passed Indiana Code 13-18-3-2(k) & (l) and much more stringent than what is required under EPA's implementing regulations and guidance. As written, Section 1(b) of the proposed rule is much too broad and vague, and is likely to lead to lawsuits from competing interpretations of rule applicability in the future. The applicability provision should be clear and simple so that all entities are able to discern applicability. Applicability of the antidegradation rule should be limited to only those instances where there is a new or increased loading of a regulated

pollutant for which a new or increased permit limit is required. This is consistent with Indiana Code 13-18-3-2(k) & (l) and federal regulations. Further it is sufficient to ensure that existing use designations will be protected and high quality waters will remain “fishable and swimmable.” Section 1(b) should be revised as follows:

(b) The antidegradation implementation procedures established in sections 4 through 7 of this rule apply to a proposed new or increased loading of a regulated pollutant to surface waters of the state for which a new or increased permit limit is required.

2. The definition of “Significant lowering of water quality” in the proposed rule is inconsistent with the requirements in Indiana Code 13-18-3-2(l)(1)(A) which limits antidegradation review to new or increased loadings “for which a new or increased permit limit is required.” A suggested wording change to address this issue is (note added words noted in ***bold italics***):

Significant lowering of water quality” means: (A) there is a new or increased loading of a regulated pollutant to a surface water of the state ***for which a new or increased permit limit is required*** that results in an increase in the ambient concentration of the regulated pollutant and the increased loading is greater than a *de minimis* lowering of water quality; and (B) none of the provisions of section 4 of this rule applies.

3. The draft rule at 327 IAC 2-1.3-4(c)(1)(a)(ii)&(iii) includes a concept of a “benchmark available loading capacity” that is much more stringent than what is required by Indiana Code 13-18-3-2 and federal regulation. The EPA has approved other states’ regulations with no such cap and we encourage IDEM to remove this section from the rule. If IDEM insists on including Section 4(c)(1)(A)(ii) and (iii), then it should be revised to include a reasonable benchmark loading capacity (e.g. 50% of the available unused loading capacity). Ensuring that *de minimis* permitted increases do not reduce the unused loading capacity of the stream below 50% will provide more than enough buffer to ensure protection of existing use designations and to ensure that a significant lowering of water quality does not occur.
4. In addition, Section 4(c)(1)(A)(ii) and (iii) as currently written insinuates that the benchmark loading capacity as calculated during the initial request will remain indefinitely, even if changes occur to the waterbody that result in increased unused loading capacity. Thus, if the initial request consumes a loading capacity up to the benchmark loading capacity, then no future increases – no matter how small – will be permitted without going through antidegradation review. There is no reason to “lock in” the initial benchmark loading capacity and ignore changes that may occur to the stream that increase unused loading capacity. For instance, if a discharge is eliminated or reduced upstream there will be a greater assimilative loading capacity downstream. A discharger downstream should be able to take advantage of this new assimilative loading capacity by recalculating the benchmark loading capacity. Allowing so will not result in a significant lowering of water quality. Therefore, if the concept of a benchmark loading capacity remains in the rule it should be revised to allow the benchmark loading capacity to be re-calculated if conditions in the waterbody change.
5. The concept of a water quality improvement project as stated in Section 7 of the proposed rule is contrary to the clear intent of IC 13-18-3-2(k) and (l). The legislative language (and the legislative committee discussions leading up to enactment of the statute) was premised on the concept that the water quality improvement project or fund was established as the basis for satisfying the requirements of an antidegradation demonstration for a significant lowering of water quality subject to an implied understanding that the lowering of water quality was

"necessary." This is evidenced by the wording in IC 13-18-3-2(k)(2) that the rule procedures will "allow for increases and additions in pollutant loadings ... if (A) there will be an overall improvement in water quality."

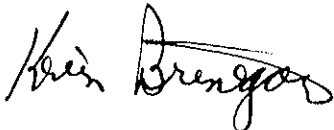
It is acknowledged that the legislation also references that (i) the procedures will be designed to "prevent degradation" (IC 13-18-3-2(k)(1)) and (ii) in addition to providing for an overall improvement in water quality, the proposal for increases and additions in pollutant loadings also is to satisfy the applicable antidegradation standards of 327 IAC 2-1 and 2-1.5.

Notwithstanding these references to elements of antidegradation procedure, the fact remains that the understanding, as well as the clear intent of the statutory language, has always been that the performance or funding of a water quality improvement project will be the primary basis of gaining approval for the increased loading by a discharger to an OSRW. However, the proposed rule is not consistent with this understanding.

As written, the proposed Section 7 requires the water quality improvement project be performed or funded in addition to an antidegradation demonstration. However, Section 5 does not clearly implement the understanding referenced above and could leave a discharger proposing a water improvement project facing an obligation to prepare a full antidegradation demonstration including the elements of subsections 5(f) and (g). While the provision of subsection 5(b)(5) of the proposed rule appears to address the situation in which a discharger actually implements a water improvement project in the watershed of the OSRW, it would be preferable for the proposed language to actually reference the water improvement project concept of IC 13-18-3-2(k) and (l) as an example. More problematically, proposed subsection 5(b)(5) does not encompass the option for a discharger under IC 13-18-3-2(l) to pay the water improvement fee in lieu of actually performing a project. Under this latter scenario, the net decrease in loading of the regulated pollutant to the OSRW watershed will not necessarily occur simultaneously with the increased loading by the discharger. To correct this oversight, Section 5(b) should be revised to expressly provide that a project involving payment of a water improvement fee pursuant to IC 13-18-3-2(l) is included within the scope of subsection 5(b). With these revisions, a proposed increase in loading to an OSRW involving a water improvement project implementation or fee payment will satisfy the antidegradation demonstration requirements with submittal of the basic information of Section 5(a) and the "necessary" information of Section 5(c).

Thank you for your consideration of these comments. If you have any questions, please feel free to contact me.

Sincerely,



Kevin M. Brinegar
President and CEO
Indiana Chamber of Commerce
115 W. Washington St., Suite 850 South
Indianapolis, IN 46206
(317) 264-3110

